STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

T'MANDO ALLEN DENSON,

Defendant-Appellant.

Supreme Court No. 152916

Court of Appeals No. 321200

Circuit Court No. 13-32919 FH

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF QUESTIONS INVOLVED

1. Defendant was charged with assault with intent to do great bodily harm less than murder, and he claimed self-defense. The trial court permitted the prosecution to purportedly "rebut" the self-defense claim by introducing evidence concerning the circumstances of a previous conviction that Defendant had for assault. The court held that it was admissible to show Defendant's "temper" and "bad judgment." Did the court err in admitting this other-act evidence under MRE 404(b) since it only showed Defendant's propensity for violence?

The trial court answered, "No."

The Court of Appeals answered, "No."

Plaintiff answers, "No."

Defendant answers, "Yes."

2. The trial in this case was a credibility contest with no hard evidence supporting either the prosecution or the defense. Under these circumstances, did the wrongly admitted other-act evidence undermine the reliability of the verdict?

The trial court did not answer.

The Court of Appeals answered, "No."

Plaintiff answers, "No."

Defendant answers, "Yes."

INTRODUCTION

"[I]n our system of jurisprudence, we try cases, rather than persons . . . ."

People v Allen, 429 Mich 558, 566; 420 NW2d 499 (1988).

This case is, sadly, an apt display of the state of disuse in which MRE 404(b) finds itself in courts throughout Michigan today. The defendant in this case was charged with assault with intent to do great bodily harm less than murder, and he intended to present evidence at trial to show that he acted in self-defense. In response, the prosecution, under the guise of "rebutting" the self-defense claim, sought to introduce evidence that on a previous, unrelated, and wholly dissimilar occasion, the defendant had assaulted a different person. In truth, it was a poorly disguised ploy to try and show that the defendant has a propensity for violence. Yet the trial court was happy to oblige the prosecution, holding with little circumspection that the evidence was admissible to show that the defendant had "some kind of temper or that he has bad judgment or something like that." And the Court of Appeals, in a befuddling opinion upholding the trial court's decision, merely called the trial court's wording "inartful." Respectfully, that's hardly the adjective that comes to mind.

To protect the integrity of MRE 404(b), this Court must intercede. It's been more than 15 years since this Court decided *People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000), the last in a triad of cases including *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), and *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), that continue to serve as the major guideposts for the application of MRE 404(b). As this case shows, the bench and bar require further direction. The

Court should grant the application in this case and reaffirm that in this state, we try cases, not people.

STATEMENT OF FACTS[1]

On the night of October 22, 2012, T'mando Denson-El discovered a large man, naked from the waist down, with his 15-year-old daughter in her bedroom. That much is undisputed. But how T'mando chanced upon this scene and what happened after is, on the other hand, roundly disputed. According to T'mando, he heard his daughter, Diamond Denson-El, scream, "[N]o, stop" (Tr V, 40),[2] and he rushed to her room to find the man pinning her down and trying to pull down her pants. (Tr V, 41-42). T'mando did what any father would do: he "went for the guy." (Tr V, 42). A fight ensued, with each man inflicting and sustaining severe injuries.

But the man told a very different story. That man was Shamark Woodward II, aged 17, who had been dating Diamond for about a week before she invited him over that night, unbeknownst to T'mando. (Tr I, 139-140). According to Woodward, when T'mando arrived home from work, Diamond ushered Woodward into her bedroom with the enticement, "Let's go upstairs and let's do it." (Tr I, 142). When they arrived in the bedroom, the pair "started to get intimate with each other," which culminated with them being "half nude." (Tr I, 144). At some point, before

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[1] Given that there has already been substantial briefing on the application, this supplemental brief focuses on the salient facts necessary to resolve the questions that the Court has asked the parties to address.

[2] For ease of reference, the pertinent transcripts will be referred to as follows:

Tr I	=	Jury trial, Vol I, 1/22/14
Tr II	=	Jury trial, Vol II, 1/23/14
Tr III	=	Jury trial, Vol III, 1/24/14
Tr IV	=	Jury trial, Vol IV, 1/28/14
Tr V	=	Jury trial, Vol V, 1/29/14
Tr VI	=	Jury trial, Vol VI, 1/30/14
Tr VII	=	Jury trial, Vol VII, 1/31/14
Tr VIII	=	Jury trial, Vol VIII, 2/3/14

they could "do it," T'mando arrived in the bedroom unannounced. (Tr I, 149-150). Woodward claimed that T'mando thereafter savagely beat him and cut him with a knife. T'mando also supposedly had both Woodward and Diamond strip nude and he took pictures of them. (Tr I, 152-153). Woodward said that through it all, he never tried to fight back. (Tr I, 160).

T'mando was charged with one count of assault with intent to do great bodily harm less than murder, MCL 750.84. The remainder of the evidence at trial concerning the res gestae of the alleged offense did not inescapably verify either T'mando's or Woodward's account.[3] Diamond corroborated T'mando's story, although the prosecution argued that she and other members of the Denson-El family had concocted the attempted sexual assault.

But the prosecution also sought to introduce evidence under MRE 404(b) concerning the circumstances underlying a previous conviction that T'mando had for assault with intent to commit great bodily harm less than murder. (Tr II, 144-145). After noting that T'mando would be claiming self-defense and defense of others, the prosecution argued that the proposed evidence would be "just an example of Mr. Denson losing control and using excessive force against an individual . . . ." (Tr II, 145-146). "And that tends to, hopefully," the prosecution said, "defeat any claim of defense of others or self-defense." (Tr II, 146). The prosecution added that it was "not being offered for propensity" but rather "to defeat the self-defense claim." (Tr II, 146). The trial court allowed the prosecution to present the circumstances of the previous assault, saying, "The Prosecutor can show

[3] A more detailed examination of the facts of this case is provided in Section II of the Argument section of this brief, wherein the harmfulness of the wrongly admitted 404(b) evidence is considered.

facts of the previous assault if he wishes to show that Mr. Denson has some kind of temper." (Tr II, 148). The court did not allow the prosecution to adduce evidence that T'mando was ultimately convicted of a crime as a result of the incident, telling the prosecution, "All you can do is talk about the facts of the earlier case with an argument that he has some kind of temper or that he has bad judgment or something like that." (Tr II, 149).

T'mando admitted that in 2002, he got into a "dispute" with a Tyrone Bush over $75. (Tr V, 105-106). T'mando believed that Bush owed him the money, but Bush disagreed. (Tr V, 106). At some point, T'mando shot Bush. (Tr V, 107-108). Further details of the incident were not elicited. Importantly, T'mando did not claim self-defense or defense of others during the incident.[4]

T'mando was convicted by a jury as charged. On February 28, 2014, he was sentenced to 5 to 20 years' imprisonment. He appealed as of right in our Court of Appeals, arguing, among other things, that the trial court had erred in admitting evidence about the 2002 incident under MRE 404(b).

The Court of Appeals affirmed his conviction in an unpublished per curiam opinion. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). The panel saw no problem with the 404(b) evidence, stating, "The contradiction of the self-defense theory constituted a

[4] The prosecution also offered testimony about T'mando's "temper." Over objection, Diamond, when asked whether T'mando had a "bad temper," testified, "He has a temper." (Tr III, 114). T'mando, though, denied that he had a bad temper. (Tr V, 108).

Additionally, the prosecution asked T'mando's wife whether T'mando had attempted to bribe Bush to say that someone else had shot him. (Tr IV, 92). The court upheld an objection to the proposed evidence and instructed the jury not to consider the prosecutor's question. (Tr IV, 92-106). Nevertheless, the bell had been rung.

proper, noncharacter purpose for admission under MRE 404(b)." *Id.* at 5. It also deemed T'mando's claim of self-defense "a specialized matter in dispute." *Id.* "The facts surrounding defendant's 2002 assault of Bush," the panel concluded, "had significant probative value toward contradicting the significant testimony that defendant introduced in support of the primary defense theory." *Id.* The panel denied that this Court's decision in *People v Knox*, 469 Mich 502, 511; 674 NW2d 366 (2004), required a different conclusion. *Id.* The panel did note, however, that the trial court's ruling on the evidence was "rather inartful." *Id.*

T'mando appealed in this Court, which, in lieu of granting leave to appeal, ordered oral argument and supplemental briefing to address "(1) whether the trial court erred when it admitted evidence under MRE 404(b) of the circumstances underlying defendant's 2002 conviction for assault with intent to do great bodily harm and, if so, (2) whether the error was harmless." *People v Denson*, ___ Mich ___; 886 NW2d 715 (2016).

ARGUMENT

I. The other-act evidence in this case was wrongly admitted under MRE 404(b) because, despite the prosecution's proclamations to the contrary, it only served to show T'mando's propensity for violence.

The basic principles behind the use of other-act evidence have been stated many times. MRE 401[5] and MRE 402[6] circumscribe the field of evidence that is relevant as a matter of logic and therefore ordinarily admissible. *People v VanderVliet*, 444 Mich 52, 61; 508 NW2d 114 (1993). MRE 404 subtracts from that field, deeming certain evidence inadmissible even though it is logically relevant. *Id.* at 61-62. MRE 404(a)[7] generally precludes evidence of a person's "character," which

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[5] MRE 401 provides as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[6] MRE 402 provides as follows:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

[7] MRE 404(a) provides as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
> (1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;
> (2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for

is defined as "a generalized description of a person's disposition or a general trait, such as honesty, temperance, or peacefulness." 2 Weinstein, Federal Evidence (2d ed), § 404.02, p 404-5−404-6.[8] MRE 404(b),[9] in turn, generally precludes evidence of other acts by a person to prove that person's character for wrongdoing. Yet this Court has deemed MRE 404 an inclusionary rule, *id.* at 64, since " '[o]nly one series

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> aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor;
> (3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;
> (4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

[8] Because the Michigan Rules of Evidence generally track the Federal Rules of Evidence, the Court can look to federal caselaw and commentary on these issues. *VanderVliet*, 444 Mich at 60 n 7.

[9] MRE 404(b) provides as follows:

> (b) Other crimes, wrongs, or acts.
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely . . . to have committed the act in question.' " *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990) (alterations in original), quoting 2 Weinstein, Evidence, § 404(8), p 404–52.

As stated, *VanderVliet*, *Crawford*, and *Sabin* continue to serve as the main decisions that guide the lower courts in the proper application of MRE 404(b). *People v Mardlin*, 487 Mich 609, 615 n 6; 790 NW2d 607 (2010), citing *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). *VanderVliet* established a now-familiar four-step inquiry:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b),[10] to an issue of fact of consequence at trial. Third, under MRE 403,[11] a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a

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[10] MRE 104(b) provides as follows:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

[11] MRE 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> limiting instruction under MRE 105.[12] [*Sabin*, 463 Mich at 55–56 (quotation marks, alteration, and citations omitted).]

This Court has warned that "a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior evidence merely because it has been 'offered' for one of the rule's enumerated proper purposes." *Crawford*, 458 Mich at 387. Similarly, "[m]echanical recitation of 'knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)." *Id.*

Moreover, MRE 404(b) isn't simply a rule of procedure. "Far from being a mere technicality, the rule 'reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence.' " *Crawford*, 458 Mich at 383–384, quoting *United States v Daniels*, 248 US App DC 198, 205; 770 F2d 1111 (1985). It also gives meaning to the principle that " 'a defendant starts his life afresh when he stands before a jury . . . .' " *Crawford*, 458 Mich at 384, quoting *People v Zackowitz*, 254 NY 192, 197; 172 NE 466 (1930). In order to protect these concerns, "courts must vigilantly weed out character evidence that is disguised as something else." *Crawford*, 458 Mich at 388.

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[12] MRE 105 provides as follows:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

A. MRE 404(b) permits the use of other-act evidence to rebut a defendant's claim that he acted with an innocent intent unless it does so by resorting to the forbidden propensity inference.

Using other-act evidence to establish a defendant's intent in a criminal trial is standard practice. In fact, it is likely the most common use of other-act evidence. 2 Weinstein, § 404.22, pp 404-97–404-100. That said, there's no bright-line rule for what kinds of other acts can establish intent. *VanderVliet*, 444 Mich at 73-74. Contrary to some discredited authority, similarity between the other act and the charged act is not necessary in every instance. *Id*. at 70 n 23; Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events, § 7.5.2, p 452 ("Logically, it is not sensible to insist on strict similarity or to attempt to state a universal rule regarding the degree of similarity needed in all cases of uncharged misconduct."). "Rather, it is the purpose that the proffered evidence will serve, that is, the basis for its relevancy, that will dictate its requisite character." *VanderVliet*, 444 Mich at 70 n 23, quoting *People v Hall*, 433 Mich 573, 585; 447 NW2d 580 (1989) (opinion by BOYLE, J., with RILEY, C.J., and GRIFFIN, J., concurring). See, e.g., The New Wigmore, § 7.5.2, pp 451-462. For example:

> Suppose that the defendant is charged with unlawful possession of cocaine. The defendant claims that his possession was unknowing; he asserts an innocent state of mind and denies mens rea. The prosecutor may prove that at the time the police arrested the defendant in possession of the cocaine, the defendant had a false driver's license on his person. The possession of the false license is logically relevant to prove mens rea because it suggests the defendant's consciousness of guilt. [Imwinkelried, Uncharged Misconduct Evidence, § 5.05, Ch 5, p 14 (footnotes omitted).]

Although possessing cocaine and possessing a false driver's license are distinct and dissimilar crimes, they are nonetheless logically relevant in this example. *Id*. Thus,

the particular circumstances of each case control whether other-act evidence will be admissible.

Turning to the present case, it belongs to a subset of cases in which the prosecution purportedly tries to disprove the defendant's claim that he acted with innocent intent by showing that he acted with the requisite culpable intent on another occasion. See *VanderVliet*, 444 Mich at 79-80. The theoretical underpinning is the "doctrine of chances," which holds that " 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.' " *Id.* at 79 n 35, quoting Imwinkelried, § 3:11, pp 22-23.

In the particular context of rebutting innocent intent using doctrine of chances reasoning, similarity between the other act and the charged act is generally required. The *VanderVliet* Court recognized that to rebut a defendant's claim that he acted with an innocent intent by showing that he had the requisite culpable intent on a previous occasion, the acts need to be similar or else they are not logically relevant. 444 Mich at 79 n 34 ("The need for other acts to be similar to one another *in the innocent intent context* derives from the requirements of logical relevance, rather than the previous mistaken assumption that all other acts needed to be similar.") (emphasis in original). The acts don't need to be identical, but in establishing intent, there must be some similarity. *Id.* at 79-80, citing Imwinkelried, § 3:11, p 23. See also *Crawford*, 458 Mich at 395 n 13. The prosecution must show that the defendant " 'has been involved in such incidents more frequently than the typical person.' " *Crawford*, 458 Mich at 394, quoting Imwinkelried, *The use of evidence of an accused's uncharged misconduct to prove*

mens rea: The doctrine which threatens to engulf the character evidence prohibition, 51 Ohio St LJ 575, 602 (1990).

Crawford is instructive in this regard. In that case, the defendant was found to have cocaine in his car during a traffic stop. *Crawford*, 458 Mich at 379-380. Specifically, cocaine was first found in a jacket that was in the "front-seat area" of the car, and a more thorough search uncovered cocaine "hidden in the dashboard adjacent to the glove compartment." *Id*. The defendant was charged with possession with intent to deliver the cocaine. *Id*. at 380. The defendant presented evidence that he had recently bought the car and had let other people use it. *Id*. at 382. The prosecution was permitted to introduce evidence concerning the defendant's previous conviction for delivery of cocaine, *id*. at 381, under the theory that it showed "the defendant's knowledge of the presence of cocaine and his intent to deliver it," *id*. at 391. The previous conviction had involved the defendant hand-delivering cocaine to an undercover police officer. *Id*. at 381-382.

This Court found that the evidence of the defendant's previous conviction was wrongly admitted. The Court highlighted the differences between the defendant's prior conviction and the present case, finding that there was "an insufficient factual nexus . . . to warrant admission of the evidence under the doctrine of chances." *Id*. at 395-396. In particular, in the prior case, the defendant had been caught in the act of delivering cocaine while in the case at hand he had only been found to be in possession of cocaine, and he presented evidence that he had possessed the cocaine unknowingly. *Id*. at 396.[13] "[T]he factual relationship between the [prior offense]

[13] "The plausibility of this defense," the Court noted, "was to be determined by the jury on the basis of its assessment of the credibility of the witnesses." *Id*.

and the charged offense," the Court explained, "was simply too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea in the present case." *Id*. The Court found that the prior conviction only served to show that the defendant had "been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine." *Id*. at 397. Therefore, it "was mere character evidence masquerading as evidence of 'knowledge' and 'intent.' " *Id*.

Knox is likewise instructive. In that case, the defendant's infant son died after the mother left him in the defendant's sole care. *Knox*, 469 Mich at 504-505. Doctors determined that the son had suffered physical abuse shortly before his death. *Id*. at 505. Defendant argued that the mother must have abused the child before she left. *Id*. at 505. The prosecution was permitted to introduce evidence that the defendant and the mother argued frequently and that defendant had physically abused her. *Id*. at 506.

This Court concluded that the other-act evidence had been wrongly admitted. The Court found that "none of defendant's alleged manifestations of anger had any similarity to the acts that resulted in [his son]'s death." *Id*. at 512. Further, there was no evidence that the defendant had previously harmed his son. *Id*. "Under these circumstances," the Court explained, "the evidence of defendant's past anger could only serve the improper purpose of demonstrating that he had the bad character or propensity to harm his son." *Id*. at 512-513. The Court further noted that the prosecutor had "specifically argued that defendant's anger-management problem was a plausible explanation for what happened to" his son. *Id*. at 513. The

Court concluded that the only reason the prosecution introduced the evidence was to establish the forbidden propensity inference. *Id*.

The teaching of *Crawford* and *Knox* is that when a defendant claims that he acted with innocent intent, other acts committed with culpable intent will not be admissible unless the other acts have some special quality that sheds light on the defendant's intent in both instances. In *Crawford*, the defendant's prior drug-dealing conviction couldn't shed any light on whether he knew about the drugs in his car in that case. It only showed that he was the type of person who would be around drugs. Similarly, in *Knox*, the defendant's incidents of domestic violence committed against the son's mother couldn't shed any light on whether he would have harmed his son. It only showed his propensity for violence.

Contrast *Crawford* and *Knox* with *People v Hine*, 467 Mich 242; 650 NW2d 659 (2002). In that case, a toddler died while she was in the defendant's sole care. *Hine*, 467 Mich at 244-245. Doctors determined the cause of death to be multiple blunt force trauma. *Id*. She had suffered several injuries, including multiple circular bruises on her abdomen and what appeared to be a fingernail mark on her cheek. *Id*. at 244-245, 249. The prosecution introduced three of the defendant's former girlfriends to testify that the defendant had physically abused them. *Id*. at 245-246. In particular, the victim's mother testified that the defendant had poked her and put his finger inside her mouth and pulled hard (a "fish-hook"), which another witness testified he also did to her. *Id*. at 246-247. This Court found that the other-acts testimony was properly admitted. It reasoned that the victim and the other-acts witnesses had suffered distinctive injuries, such as a fingernail marks on their cheeks and circular bruises from forceful pokes, and that the similarities evidenced

a common plan, scheme, or system in perpetrating physical abuse. *Id.* at 252-253. That is, the other acts in *Hine* had a special quality that shed light on how the victim sustained the injuries; the evidence did not merely show the defendant's propensity for violence.[14]

Finally, other authorities recognize that other-act evidence is more probative of intent when the other act and the charged act both involved planning rather than spontaneous action. In *United States v San Martin*, 505 F2d 918, 923 (CA 5 1974), the court held that "prior crimes involving deliberate and carefully premeditated intent—such as fraud and forgery—are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent . . . ." As applied to the facts of that case, involving a charge of assault, the court found that "the evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent." *Id.* "Indeed," the court reasoned, "such prior crimes have less to do with the type of specific intent that may arise later, as in fraud, than they do with the defendant's overall disposition or character . . . ." *Id.*

United States v Bettencourt, 614 F2d 214 (CA 9 1980), echoed the reasoning of *San Martin*. "[S]pecific intent to assault or impede," the court found, "is not

[14] It's worth noting that this Court's decision in *Mardlin*, although it involved other-act evidence used to rebut a defendant's claim that he acted with innocent intent, is largely unhelpful for answering the question posed by this case. In *Mardlin*, the defendant was prosecuted for arson after his house burned down, and the prosecution introduced evidence that the defendant had "been associated with" several previous house and vehicle fires and "arguably benefitted" from them through insurance claims. 487 Mich at 612-613. A culpable intent had never been established for any of the previous fires. *Id.* at 613. In other words, intent was disputed for both the other acts and the charged act. This is unlike the case at hand, where T'mando admitted to acting with culpable intent in the previous case but claimed innocent intent in the present case.

ordinarily transferrable to events" that are multiple years apart. *Bettencourt*, 614 F2d at 217. Instead, "[d]iscrete intent, spontaneously resulting from a unique set of circumstances, is the more usual case." *Id.* And, as rings true in this case, "[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time." *Id.* See also Kirkpatrick and Mueller, Federal Evidence (4th ed), § 4:34, p 812 ("Sometimes criminal charges arise out of acts that impulsive in nature, and intent springs up suddenly or spontaneously, in which case prior acts showing similar flare-ups are not very probative of intent, except by drawing the forbidden character inference that defendant is by nature short-fused, and acting out once means that he did so again."); Imwinkelried, § 8:9, Ch 8, p 42 ("A spontaneous act can be situational in character and consequently shed little light on the defendant's state of mind on another occasion in a different situation.").

To summarize, the circumstances of each case dictate the appropriateness of other-act evidence to show intent. Where the evidence is offered to rebut the defendant's claim of innocent intent by showing that he had the requisite culpable intent on another occasion, generally there must be similarity between the other act and the charged act. And this Court has rightly reversed convictions in cases where the other act was not sufficiently similar to the charged act so as to show intent. *Crawford*, 458 Mich 376; *Knox*, 469 Mich 502. Finally, other-act evidence is not very probative of intent when both the other act and the charged act were spontaneous.

B. In this case, the only purpose for which the prosecution offered the other-act evidence was to show T'mando's propensity for violence, and the trial court erred by admitting it.

At the outset, it's worth questioning whether the other-act evidence in this case was even logically relevant. T'mando admitted assaulting Woodward but argued that he was justified in doing so. In other words, it's undisputed that T'mando intended to beat up Woodward. Therefore, T'mando's intent was not a matter in controversy. *VanderVliet*, 444 Mich at 75 ("The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material."). The real question is why did T'mando do it: to defend his daughter from an imminent sexual assault or because he was angry at Woodward for getting "intimate" with her? Under these circumstances, it was his motive, not his intent that was really at issue. See *Sabin*, 463 Mich at 68, quoting *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925) (" 'A motive is the inducement for doing some act; it gives birth to a purpose.' "); 2 Weinstein, § 404.22, p 404-142 ("*Motive* is the impetus that supplies the reason for a person to commit a criminal act.") (emphasis in original). Other courts have held under similar circumstances that "intent" is not relevant when the defendant admits he committed the actus reus but claims innocent intent. *United States v Sanders*, 964 F2d 295, 298 (CA 4 1992) ("Since Sanders admitted the stabbing and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act.'); *United States v Commanche*, 577 F3d 1261, 1268 (CA 10 2009); *Parks v State*, 794 SE2d 623, 628 (Ga 2016). Still, "intent," "motive," and "state of mind" frequently overlap in the context of other-act evidence. New Wigmore, § 8.2, p 490, 490 nn 10, 11. Assuming that the other-act

evidence in this case retained some logical relevancy, it still can't pass the rest of the *VanderVliet* test.

First, the prosecutor didn't state a proper purpose. The prosecution argued that the proposed evidence would be "just an example of Mr. Denson losing control and using excessive force against an individual . . . ." (Tr II, 145-146). "And that tends to, hopefully," the prosecution said, "defeat any claim of defense of others or self-defense." (Tr II, 146).[15] The prosecution added that it was "not being offered for propensity" but rather "to defeat the self-defense claim." (Tr II, 146). The trial court allowed the prosecution to present the circumstances of the previous assault, saying, "The Prosecutor can show facts of the previous assault if he wishes to show that Mr. Denson has some kind of temper." (Tr II, 148). The court also said, "All you can do is talk about the facts of the earlier case with an argument that he was some kind of temper or that he has bad judgment or something like that." (Tr II, 149).

Despite the prosecution's claims to the contrary, it clearly introduced the evidence of the 2002 incident to show T'mando's propensity for violence. The prosecution's qualifier that it was "not being offered for propensity" but rather "to defeat the self-defense claim" rings hollow when it follows "just an example of Mr. Denson losing control and using excessive force against an individual . . . ." In other words, T'mando had unjustifiably used violence against someone in the past and therefore he must have done it in this case. The prosecution's "mechanical

[15] Both defense of others and self-defense came into play in this case. First, T'mando defended Diamond from an imminent sexual assault after which Woodward attacked T'mando and T'mando had to defend himself. For the sake of clarity, this brief will refer to "T'mando's claim of self-defense" as encompassing both.

recitation" of a proper purpose cannot salvage what was undeniably a propensity argument.

What's more, there is no exception to MRE 404(b) that allows the prosecution to show the defendant's propensity for violence when the defendant claims self-defense. Although not entirely clear, the prosecution seems to think that evidence showing "the kind of person" T'mando is somehow doesn't count as propensity evidence, or else that such evidence is admissible when a defendant claims self-defense. In opposing T'mando's application for leave to appeal in this Court, the prosecution argued, " The fact that defendant is a person quick to anger, who loses control and uses excessive force is contrary to his asserted intention and motive in the actions taken in the present case." (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 44). According to the prosecution, "It was not an argument that defendant has committed a crime in the past, that he is of bad character, and thus he must have committed the present crime." (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 44). But of course it was. The prosecution's doublethink aside, showing that the defendant is "a person" who is "quick to anger" is textbook character evidence. See 1 McCormick, Evidence (6th ed), § 188, pp 747-748 (stating that evidence that a person has a "violent" character is prohibited for showing action in conformity therewith). While the prosecution was certainly entitled to rebut T'mando's claim of self-defense, it wasn't allowed to do so by showing that he has a violent propensity. See, e.g., *Crawford*, 458 Mich 376; *Knox*, 469 Mich 502. The evidence of the 2002 incident "was mere character evidence masquerading as evidence of . . . 'intent.' " *Crawford*, 458 Mich at 397.

The prosecution's misapprehensions aside, this Court is still permitted to search the record to determine if the evidence was properly admitted for some other reason. *Sabin*, 463 Mich at 60 n 6. As stated, when the prosecution introduces evidence to rebut a defendant's claim that he acted with innocent intent by showing culpable intent on a previous occasion, there must be similarity between the other act and the charged act. *Crawford*, 458 Mich at 394-395; *Knox*, 469 Mich at 512. Here, the 2002 incident bore no significant similarities to the charged act. The incidents were approximately 10 years apart. The alleged victims were different. The weapons were different. In the 2002 incident, T'mando shot Bush because Bush owed him $75. In this case, even under the prosecution's version of events, T'mando did not assault Woodward over a debt. And, perhaps most importantly, in the 2002 incident, T'mando did not claim self-defense. As in *Knox*, "the evidence of defendant's past anger could only serve the improper purpose of demonstrating that he had the bad character or propensity to" commit the charged act. 469 Mich at 512-513. And "the prosecutor did not use the evidence of defendant's anger for any other reason *except* to make an impermissible propensity argument." *Id.* at 513 (emphasis in original). Moreover, both the other act and the charged act were spontaneous, and it would be foolhardy to say that the former act shed any light on the latter act, except to establish propensity.

Commentators would also seem to agree that the trial court erred in this case. For instance, Leonard posits a hypothetical liquor store robbery that the defendant admits participating in but claims that she was coerced by the other robbers. New Wigmore, § 7.5.2, p 457. The prosecution, to disprove that the defendant was coerced, offers evidence that the defendant, on a previous occasion,

had robbed a bank acting alone. *Id*. In the abstract, this isn't much different than the present case—the defendant admits committing the actus reus, denies having a culpable mens rea, and the prosecution tries to prove mens rea by showing that the defendant had a culpable mens rea on a separate occasion. Leonard finds that under the doctrine of chances, "the inference of criminal intent in the liquor store robbery is exceedingly weak." *Id*. He explains, "Because the *underlying facts* of the two cases are so different, a juror is much more likely to apply the general character inference (a person who robs banks would also be a willing participant in a liquor store robbery) than pure doctrine of chances reasoning." *Id*. (emphasis in original). Therefore, the only logical relevance is the forbidden propensity inference. *Id*.

Similarly, Leonard notes Wright and Graham's criticism of the decision in *United States v McCollum*, 732 F2d 1419 (CA 9 1984). *Id*. at 457 n 40. In that case, the defendant participated in a bank robbery but claimed that he had been hypnotized and therefore lacked a culpable intent. *McCollum*, 732 F2d at 1421. Over objection, the trial court ruled that if the defendant testified, the prosecution could introduce evidence that the defendant had been convicted 12 years earlier of armed robbery. *Id*. at 1421-1422. The Ninth Circuit affirmed that decision. Noting that the previous offense and the charged offense required the same intent, the court found the previous offense "probative as to McCollum's proffered defense that he acted under hypnosis without any intent to rob the bank." *Id*. at 1424. Leonard, disapproving this reasoning, New Wigmore, § 7.5.2, p 457, quotes Wright and Graham's rebuke of *McCollum*:

> There was no evidence that the defendant was or claimed to be hypnotized at the time of [the previous] crime. Nor, apparently, did the defendant assert that but for the

> hypnosis he was incapable of committing a crime. It is therefore difficult to see how the fact that the defendant committed a different crime when unhypnotized tends prove that he was not hypnotized at the time of the charged crime, except by the forbidden inference to a propensity to commit crime." New Wigmore, § 7.5.2, p 457 n 20, quoting 22 Wright & Graham, Federal Practice and Procedure: Evidence, § 5242 (Supp 2008).

In other words, the doctrine of chances reasoning is inapplicable in the situation presented by *McCollum* because the facts of the other act and the charged act are too dissimilar.

The same reasoning applies here. The prosecution purported to use the evidence of the 2002 incident to negate T'mando's claim that he acted in self-defense. But given the significant differences between the other act and the charged act, the 2002 incident was not useful for shedding light on T'mando's intent in 2012. Instead, it was only relevant for painting T'mando as a violent person, a purpose that MRE 404(b) forbids.

Finally, the other-act evidence should have been excluded under MRE 403. Even if it had some probative value, it was undoubtedly outweighed by the danger of unfair prejudice. When other-act evidence is used, there is a heightened danger that evidence that is only marginally probative will be given undue weight by a jury. *Crawford*, 458 Mich at 398. As this Court has explained:

> When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." [*Id.*, quoting *United States v Johnson*, 27 F3d 1186, 1193 (CA 6 1994).]

In other words, the danger is that the "reverberating clang" of the other-acts evidence will drown out the "weaker sound" of the remaining evidence, "leaving the jury to hear only the inference that if the defendant did it before, he probably did it again." *Crawford*, 458 Mich at 398-399. Courts must carefully examine other-act evidence under MRE 403 given this risk. *Crawford*, 458 Mich at 398. Further, although this Court's review of a trial court's MRE 403 determination is deferential, this doesn't mean that it is effectively unreviewable and, indeed, a trial court's decision should be reversed "where necessary to prevent injustice." *Id.* at 398 n 15.

Here, whatever probative value the other-act evidence may have held was substantially outweighed by the danger of unfair prejudice.[16] As stated, assuming that there was any probative value in the evidence, it was surely minimal. On the other hand, for the jury to hear that T'mando had previously committed an assault with a weapon must have weighed heavily on their minds. An average juror, untrained in the rules of evidence, easily could have made the wrongful assumption that "if he did it before he probably did it again." Under these circumstances, MRE 403 should have precluded the introduction of the evidence.

C. This Court should grant leave and provide further direction on the proper application of MRE 404(b) when other-act evidence is used to establish intent.

As this case shows, the lower courts require guidance from this Court. The trial court's cursory and flawed analysis in this case is far from an outlier. The "pitfall" identified in *Crawford* is still wreaking havoc on the rights of criminal defendants nearly 20 years later. 458 Mich at 387. Trial courts routinely fail to

[16] The trial court neglected to assess the evidence under MRE 403.

subject other-act evidence to the exacting scrutiny that this Court has required of them. *Id.* The bench and bar need this Court's help in addressing these difficult issues.

Further, this Court has not yet enunciated a comprehensive approach when it comes to showing "intent" through other-act evidence. See *People v Reynolds*, 495 Mich 940, 940; 843 NW2d 483 (2014) (VIVIANO, J., dissenting). *Sabin*, 463 Mich at 61-66, for example, outlined a comprehensive approach for admitting other-act evidence to show individual manifestations of a common plan, scheme, or system. The Court should similarly use this case as an opportunity to address "intent," especially in the particular context presented here—where the defendant claimed innocent intent and the prosecution rebutted this claim by showing that the defendant had the requisite culpable intent on another occasion. As the caselaw and treatises show, this situation is the subject of frequent controversy.

II. Given that the trial boiled down to a credibility contest, the wrongly admitted other-act evidence more than likely affected the outcome.

An error in the admission of evidence under MRE 404(b) requires reversal if it appears more likely than not that the error was outcome determinative. *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014); *Crawford*, 458 Mich at 399-400. In other words, the error has to undermine the reliability of the verdict. *Douglas*, 496 Mich at 566. The Court must " 'focus on the nature of the error in light of the weight and strength of the untainted evidence.' " *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). And where a trial essentially presents a credibility contest

between the defendant and the complainant, even minor corroborating evidence can tip the scales. *Douglas*, 496 Mich at, 579-580. The jury need only entertain a reasonable doubt about a defendant's guilt in order to acquit.

What's more, this Court has recognized that errors in the admission of other-act evidence can be particularly prejudicial. As stated in the discussion of MRE 403, there is a severe risk that the average juror will simply conclude that if the defendant "did it before, he probably did it again." *Crawford*, 458 Mich at 398, quoting *Johnson*, 27 F3d at 1193. And this Court has stated that "the closer the evidence approaches the forbidden inferences of character to conduct, the higher the prejudicial potential." *VanderVliet*, 444 Mich at 72 n 26.

In this case, the other-act evidence was undoubtedly outcome-determinative. The trial presented two very different versions of events from T'mando's and Woodward's perspectives, but there was essentially no hard evidence that irrefutably established one story over the other.[17] The trial was essentially a credibility contest.

Further, the other-act evidence was particularly prejudicial given the prosecution's repeated references to it. Aside from eliciting testimony from T'mando, the prosecutor referenced the 2002 incident through three other witnesses. First, the prosecutor asked whether Diamond had overheard T'mando telling someone else about "an experience that he had in Detroit where he got in trouble for losing his temper and bashing a window and shooting a guy." (Tr III, 111). After a defense

[17] That said, more witnesses corroborated T'mando's account. Diamond testified that Woodward tried to sexually assault her, and T'mando's son corroborated T'mando's claim that he went to check on Diamond after he heard a violent "big boom" in the house. (Tr V, 36; Tr II, 203).

objection was overruled, the prosecutor repeated the question, asking her if she had heard T'mando "explaining his concerns, okay, because he had gotten in trouble once before in Detroit for going over to somebody's house, bashing in their window and shooting a person?" (Tr III, 112). Diamond denied overhearing any such thing. (Tr III, 112).

The prosecutor likewise asked Rosemary about the 2002 incident with the following lengthy question:

> Okay. And the trouble he got into was that your husband claimed that Tyrone Bush owed him $75 bucks for some marijuana. And, okay, Tyrone didn't think he owed the money. And your husband went over to Tyrone's house on Whitney and bashed in his car window. And then when Tyrone came out of his house and argued with him, okay, your husband—and brandished a gun; and when Tyrone saw the gun and tried to retreat inside the house and your husband shot him. Now he got in trouble for that, right? Yes or no? [Tr IV, 91.]

Rosemary simply answered, "He got in trouble, yes." (Tr IV, 91).

Finally, the prosecutor asked Christina Delikta, Diamond's sexual assault crisis counselor (Tr V, 7, 9, 14), whether T'mando had told her about the 2002 incident in which he had "got in trouble in Detroit for assaulting somebody . . ." (Tr V, 19, 21). Delikta only remembered that T'mando had said "that he had gotten in some form of trouble prior." (Tr V, 21). Through his questioning, the prosecutor was essentially allowed to testify about the 2002 incident.

Next, in closing, the prosecutor characterized Woodward as a "good guy" and asked the jurors, "Do you get that feeling from Mr. Denson?" (Tr VII, 24). Addressing T'mando directly, the prosecutor chastised him:

> "This was just a savage beating, Mr. Denson. You lost control, just like you did in Detroit when you shot that

> guy. You're a bully, Mr. Denson and you're a coward." [Tr VII, 37.]

The prosecutor added that T'mando had "concocted" his story because he was, again, a "bully" and a "coward." (Tr VII, 37).

Finally, the prosecutor returned to the 2002 incident in rebuttal. Implicitly relying on doctrine of chances reasoning, he argued:

> The incident in Detroit. Hey, not a coincidence, okay. Not a coincident that the bully over a $75 dollar drug debt takes his gun, bashes the car window and shoots the guy while he's retreating into the house. No self defense in that circumstance. [Tr VII, 73-74.]

The prosecutor later repeated, "Well that wasn't self defense in Detroit, okay," and after referring to the incident with Woodward, said, "They're not coincidences. No self defense." (Tr VII, 75). That is, throughout closing and rebuttal argument, the prosecutor was able to paint T'mando as a "bully" who acted "just like [he] did in Detroit when [he] shot that guy."

The prosecution's emphasis on the wrongly admitted other-act evidence heightened the prejudicial effect. It wasn't just a stray remark or isolated testimony. It was a centerpiece of the prosecution's case. And, in a sense, that was understandable. As in *Knox*, "this was a close credibility contest with little hard evidence and the prosecutor improperly sought to establish [defendant's] bad character rather than risk an acquittal as a result of the slim evidence of his guilt." 469 Mich at 513 (quotation marks and citation omitted; alteration in *Knox*). And the repetition "greatly enhanced the danger of unfair prejudice arising from the admission of defendant's prior conviction." *Crawford*, 458 Mich at 400 n 17.

Next, the prosecution's arguments for deeming the error harmless are unpersuasive. First, the prosecution argues that T'mando's story failed to account for the knife wounds to Woodward. (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 20-21, 47-48). Not so. T'mando testified that both he and Woodward had pulled knives on each other when they fought in the kitchen. (Tr V, 80, 121-122). And his parole officer[18] testified that T'mando had told him that he and Woodward both grabbed steak knives when they were fighting in the kitchen. (Tr VI, 70).[19] Further, Woodward even testified that he was cut only twice, and he indicated that the wounds were rather unremarkable. (Tr VI, 130-131). Therefore, the prosecution is simply wrong when it argues that T'mando never explained Woodward's knife wounds.

Further, the Court should decline any invitation from the prosecution to assess the credibility of the witnesses and weigh the evidence in this case. This Court is precluded from considering such matters on appeal. *Mardlin*, 487 Mich at 626 ("The jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations."); *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129(1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses."). Insofar as many of the

[18] The trial court precluded any reference to T'mando's status as a parolee at the time of the offense in this case.

[19]Admittedly, trial counsel did a poor job eliciting testimony from T'mando on direct examination about the knife wounds to Woodward. Obviously, they were an important part of the trial, and T'mando had a good explanation for them that should have been more fully explored on direct examination. Although this Court has limited its review in this case to 404(b) issues, it's worth noting that T'mando has vociferously argued in the trial court, Court of Appeals, and this Court that his trial counsel rendered ineffective assistance in several respects.

prosecution's arguments focus on witness credibility and the weight of the evidence, they are proper matters for a jury untainted by the erroneously admitted other-act evidence.

Second, the prosecution submits that the jury could have believed that what began as a legitimate exercise of self-defense went too far. (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 21, 47-48). Although perhaps true, again, it's improper for an appellate court to play the part of the jury. T'mando's testimony evidenced a legitimate exercise of self-defense. Whether he was to be believed in whole or in part is a question for the jury. *Mardlin*, 487 Mich at 626. And it's much more likely that the jury would have believed T'mando in whole without the evidence of his propensity for violence, which is precisely the point.

Third, the prosecution argues that Diamond failed to report the sexual assault immediately. (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 21, 47-48). Again, that's not quite right. Diamond testified that she indeed reported the sexual assault to a school security officer whom she met with the day after. (Tr III, 94-95, 98). And the testimony showed that Diamond's mother reported the sexual assault before T'mando was even arrested. (Tr VI, 13-16, 38, 40).[20] Moreover, does the prosecution really want to argue that if a victim of sexual assault doesn't come forward immediately then she's not to be believed?

[20] The cited testimony shows that T'mando's wife, Rosemary Denson-El, called 911 on October 24, 2012, at approximately 4:00 a.m., and T'mando was arrested by his parole officer later that day during business hours.

Finally, the prosecution argues that T'mando didn't report his injuries that he claimed he suffered at the hands of Woodward. (Plaintiff-Appellee's Answer in Opposition to Defendant's Application for Leave to Appeal, p 21-22, 47-48). Implicit in this argument is the assertion that T'mando didn't suffer any injuries in the first place. But the prosecution knows that's not accurate. T'mando testified that Woodward had cut and stabbed his hands and that he suffered serious injuries as a result. (Tr V, 69, 71). Importantly, after T'mando was arrested, he was treated in jail for his injuries. But because of a discovery violation on trial counsel's part, the trial court did not allow them to be introduced. (Tr III, 69-73).[21]

Setting the prosecution's particular arguments aside, it's worth pointing out that Woodward's story was preposterous. He claimed that throughout his entire ordeal—through being beaten, cut, photographed nude, etc.—he did absolutely nothing to resist. (Tr I, 160). If the prosecution wants to argue over whose story makes more sense, it shouldn't ignore the questions about Woodward's account. This is simply to say that it's not as if Woodward's story was inherently more reliable than T'mando's. Again, these questions are for a jury, untainted by exposure to propensity evidence, to resolve.

What's more, there is direct evidence that the jury was preoccupied with T'mando's propensity for violence. The trial court allowed the jurors to ask questions of the witnesses, and one juror submitted the following question for T'mando's parole officer: "Is there a (inaudible) do you think Mr. Denson is a violent person, or can be a violent person or have a bad temper." (Tr VI, 87). The parties

[21] T'mando has argued that his trial counsel was ineffective by failing to secure these records for trial.

agreed that the question couldn't be asked. (Tr VI, 87-88). Nevertheless, it is remarkably telling. It shows that the reliability of the verdict in this case was severely undermined by the other-act evidence.

In sum, in a trial like this, with essentially just the witness's stories to go on, any piece of evidence can change the outcome. *Douglas*, 496 Mich at, 579-580. And rather than being just any piece of evidence, wrongly admitted other-act evidence carries with it a high risk of prejudice. *Crawford*, 458 Mich at 398; *VanderVliet*, 444 Mich at 72 n 26. Further, in this case, the prosecution's persistent reliance on the evidence heightened that risk. *Crawford*, 458 Mich at 400 n 17. And the plausibility of T'mando's self-defense claim was for the jury to determine, untainted by the evidence of the 2002 incident. *Crawford*, 458 Mich at 396-397. Without that evidence, the jury surely could have had a reasonable doubt in this case.

What happened at trial in this case is really quite astounding. The trial court permitted the prosecution to present irrelevant and highly prejudicial other-act evidence and argue that T'mando "has some kind of temper or that he has bad judgment or something like that." (Tr II, 149). This is classic character evidence that should never have been admitted. 2 Weinstein, § 404.02, p 404-5–404-6.[22] The prosecution was allowed to portray T'mando as the stereotypical "bad man"—someone who was involved with guns and drugs and who shot someone once upon a time. The prosecution overtly communicated to the jury: "He was violent before, he must have been violent this time, too." The prosecution was entitled to rebut

[22] The fact that neither the trial court nor the Court of Appeals recognized that this evidence was improper speaks to the need for this Court to take this case up and issue an opinion.

T'mando's claim of self-defense, to be sure, but not by relying on the one inference that MRE 404(b) forbids.

And imagine the trial without the evidence. Imagine the picture that rightly could have formed in the jury's mind. T'mando, after a hard day of work, comes home to spend time with his family, just like any other father. He hears a loud, violent sound, and hears his daughter scream, "No, stop." He rushes to her room and sees a large unknown man over his daughter about to sexually assault her. And he does what any father would do to defend his daughter and himself. Without the irrelevant and prejudicial other-act evidence, without the improper argument that T'mando is a violent person, this story makes a lot more sense.

RELIEF REQUESTED

For the reasons stated, Defendant-Appellant asks this Honorable Court to grant the application, hold that MRE 404(b) barred the evidence at issue, and reverse his conviction.

Respectfully submitted,

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